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IN THE

Supreme Court of the United States

October Term, 1966

No. 683

ROBERT J. NEALON,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Under the provisions of 28 U.S.C. 1651, petition for a writ of certiorari is hereby entered.

United States Court of Claims, by order dated 2 May 1966, dismissed the petition of the plaintiff on motion of defendant to dismiss. A motion for rehearing by plaintiff was dismissed on 15 July 1966.

The question presented for review can be stated as: Does the plaintiff in a petition to the U. S. Court of Claims have to show any arbitrary and capricious action on the part of the USAF Board for the Correction of Military Records in order to obtain a correction in his military records showing a promotion from

the grade of Major to Lt. Colonel, when the records sought to be reviewed in the case indicate clearly that the records of the USAF were not complete and caused the injustice. (This fact that the records were not complete was never denied by the United States.)

A concise statement of the case containing the facts material to the consideration of the questions presented follows:

> The records of the United States Air Force were in error and caused an injustice. 10 USC 8442 (Act of August 10, 1956, Ch. 1041 and 1 70A Stat. 1) *inter alia* states "under regulations prescribed by the Secretary appointments shall be made on a *fair and equitable basis*." The Secretary had prescribed these regulations in AFR 36-89, specifically para. 4a: "Headquarters USAF use the Officers Selection Folder (AF Hq Form 0-2078) as the principal instrument for evaluating an officer's qualifications for promotion."
>
> The error and injustice is patent on the face of the record. (Selection Folder AF Hq Form 0-2078). The last OER that the Selection Board saw was 30 Sept. 1958, despite the fact that one was written for the prior 16 month period more than two (2) months prior to the convening of the Board. This folder has in one section all Officer Effectiveness Reports. AFM 36-10 in Chapter 5, Part 11, Para. 5-6, stated that "Major Air Commanders will insure that reports are received at Headquarters USAF within 60 days of the date reports were required." The Selection Board for FY 60 Promotion to Temporary Grade of Lt. Colonel met 4 April 1960. The records were erroneous, but still presented to the Board in an arbitrary, capricious and manifestly unjust manner since no Officer Effectiveness Report covering a period for more than eighteen (18) months

prior to convening of the Board was in record. This report, which was for a period from 1 Oct. 1958 to 1 Feb. 1960, was not received and filed in the record question until after the Board had adjourned and was never seen by the Board despite the fact that it was more than 60 days since required and AFM 36-10 was controlling. The period in question comprised in excess of the 30 per cent of the total period in the grade of Major at that time. The total disregard of the Selection Board Secretariat in not perfecting the record clearly and concretely was not in good faith and was reason for deferral.

This case was presented to the U. S. Court of Claims who stated that the plaintiff had failed to show any arbitrary or capricious action on the part of the Board and dismissed the petition. This was ordered despite the fact that the defendant never denied the allegations of the petition. Specifically, that 10 USC 8442 and its own regulations (AFR 36-89) had been ignored by the defendant (USAF) and since these promotion boards are held in secrecy by policy of the USAF, there is no possibility of the plaintiff being able to prove the arbitrary or capricious nature of their decision, but simply that his entire records were not available to the Selection Board.

Therefore, plaintiff requests a writ of certiorari from this Court.

Respectfully submitted,

JOHN J. NEALON

1 Thomas Circle
Washington, D.C.

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that as of the 13th day of October, 1966 service of this Petition has been made by mail on the Solicitor General and Attorney General of the U. S. respectively.

John J. Nealon

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 683

ROBERT J. NEALON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On May 2, 1966, the Court of Claims, on the government's motion, dismissed petitioner's suit (Pet. 1), and rehearing was denied on July 15, 1966 (*ibid.*; R. 29). The petition for a writ of certiorari was filed on October 14, 1966. This was 91 days after the order denying rehearing. Title 28 U.S.C. 2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review

shall be taken or applied for within ninety days after the entry of such judgment or decree."

We respectfully submit that the petition should be dismissed as untimely.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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